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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP PIERRE VAUGHN, Defendant and Appellant.	B205369 (Los Angeles County Super. Ct. No. BA327862)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed.

Sunnie L. Daniels, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie A. Miyoshi and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Phillip Pierre Vaughn of possession of cocaine base for purpose of sale (Health & Saf. Code, § 11351.5) and possession of marijuana for sale (Health & Saf. Code, § 11359). Defendant admitted suffering a prior robbery conviction within the meaning of the three strikes law (Pen. Code, §§ 1170.12, subds. (a)-(d) and 667, subds. (b)-(i)) and serving a prior prison term within the meaning of Penal Code section 667.5, subdivision (b). Defendant was sentenced to nine years in state prison, consisting of the midterm of four years on the cocaine charge, doubled due to the prior strike conviction, and enhanced by one year for the prior prison term. The sentence on the marijuana charge was stayed pursuant to Penal Code section 654.

In this timely appeal from the judgment, defendant argues he was: (1) denied his Sixth Amendment right to a fair and impartial jury when the trial court refused to discharge the jury panel following a prejudicial statement made by a prospective juror; and (2) denied his constitutional right to fair notice of the charges when the prosecution introduced evidence that he possessed cocaine base in an amount greater than that established at the preliminary hearing. We affirm.

FACTS

As the sufficiency of the evidence is not in dispute on appeal, we briefly summarize the facts in the light most favorable to the judgment. On the evening of August 21, 2007, officers of the Los Angeles Police Department on bicycle patrol in Hollywood saw what they believed to be a hand-to-hand sale of narcotics between defendant and another man identified as "Greene." Greene was detained as he walked away from defendant and found to be in possession of marijuana.

Defendant was also detained and his backpack searched at the scene. From inside the backpack, officers recovered a grocery bag containing 173.16 grams of marijuana and a cigarette box containing 3.37 grams of cocaine base. The backpack was the subject of a more thorough search after defendant was transported to the police station. That search

led to the discovery of an additional 8.11 grams of cocaine. Expert testimony was presented to establish that the seized substances were cocaine base and marijuana, and that the items were possessed for the purpose of sale.

The two items of cocaine base were tested at different times in the crime lab. The 3.37 grams was tested on August 23, 2007, two days after defendant's arrest. The 8.11 grams of cocaine base was tested on December 13, 2007, shortly before the start of trial.

DISCUSSION

I

THE STATEMENTS OF PROSPECTIVE JUROR NO. 16

Defendant argues that prejudicial remarks made by prospective juror No. 16 during voir dire tainted the entire panel of prospective jurors and resulted in the denial of a fair and impartial jury under the Sixth Amendment. Defendant contends the trial court was obligated to impanel a new set of jurors as the only means to cure the harm from the juror's statements. We disagree.

A. Prospective Juror No. 16's Voir Dire Comments

In order to properly address defendant's contention, we set forth the trial court's discussion with prospective juror No. 16 in its entirety:

"Prospective Juror No. 16: My uncle is a -- was a public defender and we had many long conversations. I do not believe that he had -- he said he had one innocent person that he did, but he just wanted everybody to have a fair and legal trial; and that's what I believe what people deserve, a fair and legal trial. But I do not believe they're usually, almost always, not innocent.

"The Court: Okay. Well, let me ask you this question: You talked about your conversations with your uncle. If you were selected to be a juror in this case, could you put aside those conversations and decide the case based solely on the evidence?

"Prospective Juror No. 16: No, because it costs too much for the District Attorney to bring people to trial and they only do it if they have a solid case. And the only reason people get off is because of misfunctions in the judicial process, illegalities. I don't even think people who -- it is a waste of money to try marijuana charges.

"The Court: So you would --

"Prospective Juror No. 16: But not the crack cocaine charges. That's not wasting the taxpayer's dollars.

"The Court: So if you were selected to be a juror in this case, and if I gave you the instruction as I'm giving all the jurors to put aside your personal biases and decide the case based solely on the evidence, and proved their case against [defendant], could you come back with a verdict of not guilty.

"Prospective Juror No. 16: For the crack cocaine, no; for the marijuana, yes. I mean, it's such a vast difference. I don't know what to say. They're like two different trials. I guess in our system they're the same, they're drugs.

"The Court: Okay.

"Prospective Juror No. 16: But that's not how I see it.

"The Court: I guess the question what I'm asking though is can you follow the court's instructions and simply decide the case based solely on the evidence and put aside your own personal feelings about how you feel about crack cocaine or marijuana? Or do you think those feelings you have would sort of seep in and influence your decision in this case?

"Prospective Juror No. 16: They will seep in.

"The Court: All right. Thank you very much for your honesty, ma'am."

B. Defendant's Request for a New Venire and the Trial Court's Ruling

On Friday, December 14, 2007, prospective juror No. 16 was challenged for cause by defendant. The trial court sustained the challenge. Defense counsel told the court he "would like a hearing in that she might have contaminated the panel with her remarks." The court indicated it would address the issue the following Monday.

On Monday, December 17, 2007, defense counsel told the trial court he thought prospective juror No. 16 had "tainted the panel." According to defense counsel, the jury heard her "forceful speech," although counsel believed she was lying and trying to get out of jury service, which succeeded. He asked the court to order the juror be investigated for perjury and a new jury panel be ordered. He did not believe the harm resulting from her comments could be cured with an admonition.

The trial court shared defense counsel's skepticism as to prospective juror No. 16's honesty and motivation. The court took the issue of impaneling a new jury under submission but declined to request an investigation of the juror. Jury selection was completed and proceedings adjourned for the day.

On Tuesday, December 18, 2007, the trial court returned to the issue of defendant's claim the jury panel had been tainted. Citing *People v. Martinez* (1991) 228 Cal.App.3d 1456 and *People v. Cleveland* (2004) 32 Cal.4th 704, the court ruled the juror's comments did not provide the other jurors with information particular to defendant's case, but merely exposed them to one person's opinion about the judicial system. The defense motion was denied.

C. Analysis

We review the issue under the deferential abuse of discretion standard. "We believe the trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme

that its discharge is required. Defendant cites no case, and we have found none, indicating that such a drastic remedy is appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks. Unquestionably, further investigation and more probing voir dire examination may be called for in such situations, but discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*People v. Medina* (1990) 51 Cal.3d 870, 889; see *People v. Martinez, supra,* 228 Cal.App.3d at pp. 1466-1467 [abuse of discretion standard applies to motion to dismiss entire jury panel].)

In *People v. Cleveland, supra,* 32 Cal.4th 704, the defendant argued that a prospective juror's prejudicial comments tainted the entire venire in a capital case. The juror was a retired law enforcement officer, experienced in homicide cases, "who had testified in court over a thousand times." (*Id.* at p. 735.) The juror "expressed the opinion that the death penalty was 'too seldom [used] due to legal obstructions'" and later told the court he should not remain on the case because "'it would be unfair to the defense based on my knowledge of how these trials are conducted.'" (*Id.* at pp. 735-736.)

Addressing the merits of the contention that a new venire should have been summoned, our Supreme Court observed that "[m]any prospective jurors express many different general opinions regarding the judicial system. These expressions of opinion do not taint the jury. The comments here did not give the other prospective jurors information specific to the case, but just exposed them to one person's opinion about the judicial system. [Citation.] The circumstance that this particular opinion came from a retired peace officer with experience in homicide cases and trial proceedings does not change matters. It would no more prejudice a jury panel to hear that a retired (or active) peace officer believes the system is tilted in favor of defendants than to hear a criminal defense attorney express the opposite view." (*People v. Cleveland, supra,* 32 Cal.4th at p. 736.)

The trial court did not abuse its discretion in denying defendant's motion to discharge the panel of prospective jurors and summon a new venire. Prospective juror No. 16 did not purport to provide information about defendant or his case. The juror repeated comments that she attributed to her uncle. As *Cleveland* teaches, this is insufficient to warrant the drastic remedy of discharge of the venire.

Defendant's reliance on *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630 is unavailing. A prospective juror in the child sexual abuse prosecution in *Mach* was a social worker with the State of Arizona Child Protective Services. The juror indicated before the entire jury panel that she would have a difficult time being impartial in that "sexual assault had been confirmed in every case in which one of her clients reported such an assault." (*Id.* at p. 632.) Further questioning established the juror "had never, in three years in her position, become aware of a case in which a child had lied about being sexually assaulted." (*Ibid.*) The Ninth Circuit "presumed" the juror's comments "tainted" at least one juror, violating the defendant's right to an impartial jury.

Mach is not controlling for three reasons. First, California courts are not bound by rulings of intermediate federal courts. (*People v. Zapien* (1993) 4 Cal.4th 929, 989.) Second, we are bound by our Supreme Court's analysis in *Cleveland*, which does not embrace the Ninth Circuit's presumption of taint of the jury pool. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Third, *Mach* is distinguishable in that the thoughts conveyed by prospective juror No. 16 did not touch upon the merits of the case on trial, but merely were the juror's version of what her uncle purportedly had told her concerning the criminal justice system in general. Given these considerations, *Mach* does not compel reversal.

Our review of the entire jury selection in this case reveals that jurors expressed a wide range of attitudes toward the legal system and law enforcement, many of which were negative. Some prospective jurors told of their unfavorable views of drug laws, while others detailed negative experiences with the courts and law enforcement. When appropriate, those jurors were removed upon a challenge for cause, as was prospective

juror No. 16. The jury selection system worked as intended by drawing out these attitudes. The trial court acted well within its considerable discretion in denying defendant's motion to impanel a new venire.

II

ADMISSIBILITY OF THE EVIDENCE OF COCAINE NOT INTRODUCED AT THE PRELIMINARY HEARING

Defendant next argues the trial court violated his constitutional right to fair notice of the charges by permitting the prosecution at trial to introduce evidence of the 8.11 grams of cocaine recovered from his backpack at the police station, because evidence of that contraband was not introduced at the preliminary hearing, in which the prosecution relied only upon the 3.37 grams of cocaine. Defendant reasons that he was prosecuted for an offense not shown by the evidence at the preliminary hearing.

A. Background

At the preliminary hearing, the prosecution only presented testimony regarding the seizure of the 3.37 grams of cocaine from the cigarette box in defendant's backpack. Defendant and the prosecution stipulated to the chemical analysis and weight of the cocaine base for purposes of the preliminary hearing only.

At trial, the prosecution introduced evidence of both items of cocaine—that in the cigarette box and that in the plastic baggie in a pocket of the backpack. The prosecutor intended to use photographs depicting the three items of contraband to establish the charge of possession of cocaine base for purpose of sale.

Defense counsel told the trial court he did not see the photographs until that morning, in violation of Penal Code section 1054. The prosecutor replied she was unaware counsel had not seen the photographs, as she had just received the case for trial and was not involved with earlier discovery. There had been other prosecutors and a

different defense attorney on the case earlier, so it was unclear what had been disclosed earlier to the defense. The prosecutor had shown the photographs to defense counsel that morning and he raised no issue with her at that time. Defense counsel said he had not heard about the 8.11 grams of rock cocaine, as it was not mentioned at the preliminary hearing where there had been a stipulation to 3.37 grams of cocaine but no mention of the additional quantity.

The trial court asked for briefing on the issue. Defense counsel emphasized that his request was for the court to exclude the 8.11 grams of cocaine from consideration in the case.

After briefing, the trial court denied the motion to exclude the evidence and initially found no violation of Penal Code section 1054. The court reasoned that the police and property reports were given to the defense, and those reports mentioned the two separate amounts of cocaine. Although there was a stipulation to the 3.37 grams of cocaine at the preliminary hearing, that stipulation was only for the purpose of the preliminary hearing. The additional 8.11 grams of cocaine were part of the same transaction for which defendant was held to answer under Penal Code section 739. Defense counsel's request for an instruction on late discovery was denied.

As the trial court considered additional argument, the prosecutor explained that the 8.11 grams of cocaine was not tested initially, but she requested it be tested before trial, and as soon as she received the results, she gave them to defense counsel. The fax stamp on the lab results bore the date of Friday, December 14 at 10:56 a.m. The prosecutor believed she saw the fax at the end of the day and gave it to defense counsel the following Monday.

Defense counsel argued the prosecution had an affirmative duty to disclose the test results 30 days before trial under Penal Code section 1054, and he did not receive that notice, resulting in violation of due process. He also argued the preliminary hearing transcript gave defendant notice of the charges and the evidence to be presented, and he had no obligation to investigate the drugs himself. The trial court then determined the defense had the better of the argument on late discovery and although the evidence of the

8.11 grams of cocaine was admissible, the jury was instructed on late discovery pursuant to Judicial Council of California Criminal Jury Instructions (2007-2008) CALCRIM No. 306, over the prosecutor's objection.

B. Analysis

"Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 317.) "In addition to the advance notice provided by the information and preliminary examination, the cases observe that defendant may learn further critical details of the People's case through demurrer to the complaint or pretrial discovery procedures. [Citations.]" (*Ibid*.)

We have no trouble concluding that defendant had constitutionally adequate notice of the charge against him. The preliminary hearing testimony described the search of defendant's backpack and the discovery of the 3.37 grams of cocaine base, which was the only item analyzed at that time. However, it is undisputed that the police and property reports put defendant on notice when the additional cocaine base was recovered from his backpack during the investigation.

The prosecution was not required to introduce all of the evidence pertaining to the charge of possession of cocaine base for the purpose of sale at the preliminary hearing. To the contrary, a preliminary hearing only requires enough evidence to establish that a criminal offense has been committed and there is sufficient cause to believe the defendant is guilty. (Pen. Code, § 872.) It is common for the prosecution to introduce the minimum amount of evidence necessary to obtain an order holding the defendant to answer for trial. Because defendant was lawfully held to answer for trial following the preliminary hearing, it was permissible for the prosecution to introduce all evidence from the same set of facts which tended to prove guilt.

Moreover, unlike the scenarios in the authorities relied upon by defendant, there was only one offense of possession of cocaine base for purpose of sale in this case. Defendant could not have been convicted of more than one offense of possession of cocaine base for sale, despite his possession of two separate items of contraband. A single crime cannot be fragmented into more than one offense. (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1073; *People v. Schroeder* (1968) 264 Cal.App.2d 217, 228.) Simultaneous possession of two identical items of controlled substances is one offense. (See *People v. Schroeder, supra*, at p. 228; compare *People v. Burnett* (1999) 71 Cal.App.4th 151, 169-170 ["There can be no question that the evidence in this case showed two completely different incidents, involving two separate weapons, that could have supported two charges of violation of section 12021, subdivision (a)"]; *People v. Vance* (1956) 138 Cal.App.2d 871, 873, 877 [an "immaterial" amendment changed the description of the car the defendant was charged with burglarizing from "1950 Ford 4-door sedan" to "1948 Dodge 2-door sedan" but the case involved a single incident was and the defendant knew the surrounding circumstances of the offense].)

There was no violation of due process based on a lack of notice. The trial court properly admitted the 8.11 grams of cocaine base into evidence.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J. ARMSTRONG, J.